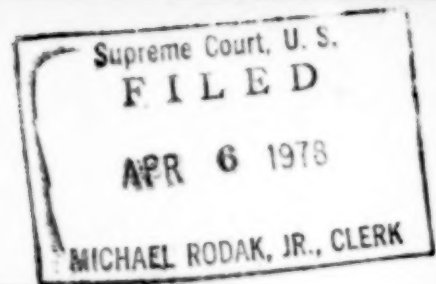


No. 77-1095



In the Supreme Court of the United States

OCTOBER TERM, 1977

VERA ZABALA CLEMENTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-54a) is reported at 567 F. 2d 1140. The initial opinion of the district court (Pet. App. 1a-26a) is reported at 422 F. Supp. 564. The district court's supplemental opinion (Pet. App. 27a-34a) is reported at 426 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a) was entered on December 16, 1977. The petition for a writ of certiorari was filed on February 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Aviation Administration was required to inspect the aircraft in which petitioners' decedents were traveling and to warn them of safety violations.

STATEMENT

Petitioners' decedents were killed in the crash of an airplane on take-off in 1972 from the San Juan International Airport. Petitioners brought this suit in the United States District Court for the District of Puerto Rico, contending that federal employees should have inspected the airplane, discovered its lack of airworthiness, and thus prevented the crash.

The district court concluded that an internal personnel directive of the Federal Aviation Administration (FAA) required the employees to perform an inspection. According to the court, directive SO 8430.20C (the "Southern Order") required federal personnel in San Juan to inspect every chartered aircraft of the type involved in this case before take-off, and to warn the passengers and crew if the flight was an "illegal flight" (Pet. App. 13a-16a, 30a-31a).¹ The court held that the flight in this case was an "illegal flight" because the plane was loaded in excess of maximum allowable weight and did not have a proper flight crew, and no one had warned the passengers and crew (*id.* at 12a-13a, 16a-17a). It also held that if federal personnel had given an appropriate warning, petitioners' decedents would not have made the ill-fated flight (*ibid.*).

The court of appeals reversed, holding that, although the FAA employees' failure to inspect and warn might be

¹The Southern Order is reproduced as an Appendix to the brief.

grounds for agency discipline, it was not tortious (Pet. App. 40-41a). It concluded that no Puerto Rican statute or decision creates a duty to inspect in circumstances where, as here, there is no statutory duty to carry out inspections, the failure to inspect did not add to the pre-existing risk, and "there is no evidence that anyone relied on the contents of SO 8430.20C and limited their own safety precautions accordingly" (*id.* at 41a-43a). The court therefore held that the United States is not liable.

ARGUMENT

The comprehensive opinion of the court of appeals addresses the arguments petitioners make here. We rely on that opinion in most respects. The Federal Tort Claims Act adopts state law as the rule of decision (28 U.S.C. 1346(b)). The court of appeals applied Puerto Rican law to the facts of this case and concluded that there was no duty to inspect and warn. That decision, concerning only state law issues, does not need review here. *Bishop v. Wood*, 426 U.S. 341, 345-347. Cf. *Arizona v. Washington*, No. 76-1168, decided February 21, 1978, slip op. 14. And although the court of appeals drew on general principles of tort liability in interpreting Puerto Rico law, petitioners have not offered any persuasive argument that under those general principles the federal government has a duty to prevent private citizens from violating federal laws or safety rules. See *Chesapeake & Ohio Ry. v. Mihos*, 280 U.S. 102, 106-107.

1. Petitioners contend that the decision here conflicts with the rule, often followed in cases of negligence by air traffic controllers, that if the government undertakes to perform a service, "engender[s] reliance" on the service, and then neglects to carry out its duties, it may be

responsible for the harm that flows from its neglect. *Indian Towing Co. v. United States*, 350 U.S. 61, 69. But, as the court of appeals observed, petitioners' decedents could not have relied on the Southern Order to protect them from violations of air safety rules (Pet. App. 42a-43a); there was no evidence that petitioners' decedents or any other person knew about or relied on the Order. The directive had been in effect only a few months at the time of the crash (*id.* at 13a and n. 19). The court of appeals carefully discussed and distinguished the air controller cases (*id.* at 45a-48a). Because no rule of law requires the federal government to undertake a program of inspections or to carry out flawlessly such a task once it has been undertaken, there is no basis for the imposition of liability.²

²Petitioners' contention (Pet. 16, 20) that the court of appeals required them to establish that their decedents specifically relied on the Southern Order is incorrect; the court stated that a showing of reliance by the general public would be enough (Pet. App. 47a-48a).

Because of the absence of reliance by any of the public on inspections under the Southern Order, this case is quite unlike the air controller cases; there is indisputably general reliance on the guidance provided by air traffic controllers.

Petitioners' contention that the decision here conflicts with three other cases—*Arney v. United States*, 479 F. 2d 653 (C.A. 9); *Griffin v. United States*, 500 F. 2d 1059 (C.A. 3); and *Downs v. United States*, 552 F. 2d 990 (C.A. 6)—also is unfounded. In *Arney* an FAA inspector, after making a ground inspection, ordered design modifications that caused the crash; no federal employee played a similar role in the present accident. In *Griffin* the United States was found liable because it made public representations that it had inspected a vaccine and found it fit for use; there was neither inspection nor announcement here. And *Downs* involved an effort, unfortunately conducted negligently, by federal agents to rescue the passengers of a hijacked plane; that case applied the acknowledged doctrine that a rescuer must use reasonable care in performing the rescue so as not to make things worse.

2. The court of appeals did not decide whether the Southern Order *required* employees to inspect; it assumed that it did for purposes of discussion (Pet. App. 40a). We submit, however, that petitioners' claims must fail for the additional reason that the Southern Order does not require an inspection of each departing aircraft meeting the description of the order. The order states what should be done at a ramp inspection but does not deal with the frequency of such inspections (see App., *infra*, pp. 9-10). Indeed, the testimony at trial established that there were approximately 100 take-offs per day of aircraft subject to the Order in the Puerto Rico region (Tr. 573), but that the region (which includes the Virgin Islands, Trinidad and part of South America) had only 9 inspectors to carry out all regulatory and investigatory functions (Tr. 587-588). The Order therefore could not have been intended to require inspections of every plane before every take-off.

Moreover, even if an inspection had been made, warnings would not have been given directly to the passengers. Paragraph 6(d)(2) of the Order provides that if the inspector finds "noncompliance" with applicable regulations he shall advise the "operator and flight crew" only, and Paragraph 7(c) directs the inspector to consult the enforcement handbook if there is "serious non-compliance." The Chief of the Flight Standards Division for the Southern Region testified that inspectors had no authority to give warnings to passengers (Tr. 1126-1127). An FAA inspector is not authorized to discuss with the public anything that may reflect on an operator's ability and character (Tr. 582); the FAA enforcement handbook provides instead a number of alternative methods of dealing with emergency situations.³

³Petitioners contend that Section 601 of the Federal Aviation Act of 1958, 72 Stat. 775, as amended, 49 U.S.C. 1421, requires inspec-

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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APRIL 1978.

tions and warnings and thus provides an independent basis for tort liability (Pet. 23-25). But although that section certainly authorized the issuance of the Southern Order, it does not impose an obligation on the FAA to promulgate that or any other order. It leaves to the agency the choice of regulations and orders that would "reduce * * * accidents." It therefore does not serve as an independent source of duty to petitioners' decedents in this case, because it implicates only discretionary functions. See 28 U.S.C. 2680(a).

APPENDIX

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
SOUTHERN REGION

SO 8430.20C

25 Sep. 72

SUBJ: CONTINUOUS SURVEILLANCE OF LARGE AND
TURBINE POWERED AIRCRAFT

1. *PURPOSE.* This order outlines procedures for a continuous surveillance program of large and turbine powered airplanes. The program is further extended to include surveillance of designated maintenance inspectors who inspect these aircraft.
2. *DISTRIBUTION.* This order requires action by Air Traffic field facilities and General Aviation, Air Carrier, and Flight Standards District Offices. It is distributed to these facilities and to branch level in Flight Standards and Air Traffic Division, and Area Air Traffic Branches.
3. *ACTION.* Flight Standards ACDOs, GADOs, and FSDO will coordinate with Air Traffic facilities to establish the method for notification of arriving and departing large aircraft and turbine powered aircraft that cannot be readily identified as bona fide air carriers, commercial carriers, travel clubs, air taxis, or executive operators. Representative of these are: DC-3, C-46, M-404, CV-240/340/440, DC-6, DC-7, L-1049, Learjet, Jet Commander, Sabreliner, Gulfstream, JetStar, and Falcon Jet. To accomplish this program effectively, consideration should be given to night and weekend surveillance with the use of irregular or modified workweek, as necessary.

4. **CANCELLATION.** This order cancels SO Order 8430.20B dated 2 Aug. 71.
5. **BACKGROUND.** Several accidents/incidents involving noncertificated operators disclosed that these operators were transporting specialized groups for compensation or hire without an appropriate operating certificate, and little regard to airworthiness safety standards on their aircraft. During the special 60 day surveillance program completed by Flight Standards offices, it was discovered that a considerable number of such noncertificated operators of large aircraft and turbine powered aircraft are engaged in passenger and cargo commercial operations contrary to applicable provisions of either Part 121 or 135 of the Federal Aviation Regulations.
6. **SURVEILLANCE PROCEDURES.** ACDOs, GADOs, and FSDO will provide continuous surveillance of large and turbine powered aircraft to determine noncompliance of Federal Aviation Regulations. At least the following actions will be taken:
 - a. Contact noncertificated operators of large and turbine powered aircraft within your area of responsibility, and advise them of certification requirements, as appropriate.
 - b. Conduct airport surveys to determine the number, type and status of large and turbine powered aircraft on airports. Each office should record this information and maintain it in a current status for ready reference.

- c. Continue efforts to encourage colleges, universities, athletic and other specialized groups to contact the nearest Flight Standards office prior to engaging operator for air transportation.
- d. In cases when information is known in advance of flight:
 - (1) Interview operator/owner, flight crews, and others, including passengers to determine whether the proposed flight is a commercial or private operation.
 - (2) If noncompliance with applicable regulations is indicated, advise the operator and flight crew accordingly.

7. **ON SITE INSPECTION.**

- a. Conduct ramp inspection with at least the following emphasis to determine that the crew and operator comply with regulatory requirements for safety of flight:
 - (1) Preflight
 - (2) Appropriate charts (enroute, area, approach)
 - (3) Runway analysis (departure, destination(s), alternate(s))
 - (4) Weather (departure, enroute, destination, alternate, winds aloft, area forecast)
 - (5) NOTAMS (departure, destination, alternate)
 - (6) Airworthiness of the aircraft
 - (7) Aircraft registration
 - (8) Weight and Balance

- (9) Aircraft logbook (compare preflight discrepancy with write-ups and carry-over items)
- (10) Pilot qualification and medical certificates including recency of experience
- (11) Fuel load, enroute requirement, landing weight
- (12) Seat, seat belts, tie down equipment and cargo
- b. When feasible, arrange for on-site legal assistance as required.
- c. When serious noncompliance is apparent, consider emergency actions in accordance with Enforcement Handbook.
- d. Enroute inspection by FAA inspectors will not be conducted when operations are considered illegal or questionable. Clear indication of alleged illegal flight should be made known to flight crew and persons chartering the service.
- e. When pilot competence is questioned, consider reexamination under Section 609, Federal Aviation Act of 1958.
- f. Legitimate corporate airplane operations should not be subjected to repetitive ramp inspections (does not refer to time sharing). At the option of the operator, a statement may be entered in the aircraft logbook with time/date and location indicating ramp inspection completed. FAA inspectors finding such statement in logbook, will make their own determination as to need for ramp inspection.

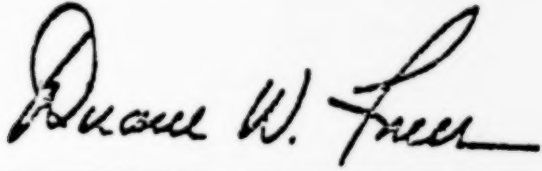
8. *ENFORCEMENT INVESTIGATION PROCESSING.*


- a. When noncompliance of any kind is found, investigation and violation action shall be given priority second only to aircraft accident investigation.
- b. When documentation of evidence is a problem due to hostile witness, consider the use of an order of investigation.

9. *COORDINATION.*

- a. The Atlanta and Miami ACDOs, and Miami, St. Petersburg, and Atlanta GADOs will appoint office coordinators and alternates; each of the remaining ACDO, GADO, and FSDO chiefs will appoint a member of his office to act as coordinator.
- b. The coordinator will perform the following duties, as necessary:
 - (1) Establish contact with other government agencies, such as FBI, Narcotic and Dangerous Drugs, Customs and Immigration. Provide FAA ramp inspection manpower after coordination with other agencies in order not to negate functions of other agencies.
 - (2) Establish coordination across regional lines, when required. Use FTS, Southern Region Control Central, and direct telephone lines, as necessary. Principal use of this feature will be to provide offices of other regions with information concerning a suspected operator, which may not pass through Air Traffic channels.

- c. Contact designated maintenance persons to determine individuals responsible for maintenance inspections, as necessary.
- d. Request use of other FAA specialists, as necessary to assist in curtailing or documenting illegal large and turbine aircraft operations.

A handwritten signature in black ink, appearing to read "Phillip M. Swatek". The signature is fluid and cursive, with a large initial "P" and "S".

 PHILLIP M. SWATEK
Director, Southern Region